IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 199

GEORGE B. HARRIS, Judge of the United States District Court for the Northern District of California,

Petitioner,

vs.

LOUIS NELSON, Warden,

Respondent.

BRIEF FOR PETITIONER

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Opinion Below

The opinion of the Court of Appeals is reported at 378 F. 2d 141. (A 40)

Jurisdiction

This Court has jurisdiction under 28 U.S.C. §1254(a), having issued a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this matter on June 17, 1968.

Statutes and Rules Involved

Statutes

28 U.S.C. §2243 (final paragraph): "The court [in habeas corpus] shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

28 U.S.C. §1651(a):

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Federal Rules of Civil Procedure

Rule 1:

"These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 33:

"Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within

10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule."

Rule 81(a)(2):

"In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States. The requirements of Title 28, U.S.C. § 2253, relating to certification of probable cause in certain appeals in habeas corpus cases remain in force."

Question Presented

Is a United States district court judge without jurisdiction to order discovery by way of written interrogatories in habeas corpus proceedings?

Statement of the Case

On August 9, 1963, Alfred Walker, the petitioner in the habeas corpus action which gives rise to the present controversy, was arrested by the Oakland, California police for alleged illegal possession of marijuana. The arrest was made solely on the basis of information supplied to the arresting officers by an informer, one Frances Jenkins. An arrest warrant was neither sought nor obtained. Nor did the police investigate or corroborate the informer's story. (A 11)

On September 18, 1963, a preliminary hearing concerning the alleged violation was held, and petitioner Walker

was ordered to answer for the allegations. On December 4 and 5, 1963, he was tried for and convicted of possession of marijuana for sale.

Following an exhaustion of other remedies, on November 22, 1965, petitioner Walker filed for a writ of habeas corpus in the United States District Court for the Northern District of California, contending, *inter alia,* that his arrest and the search of his premises without warrant were unconstitutional because they were not made upon probable cause. On August 5, 1966, petitioner Walker moved for an evidentiary hearing to determine whether his arrest and the search were made upon probable cause and, more specifically, whether informer Jenkins was reliable or whether the arresting officers could reasonably have considered her information reliable. This motion was granted on August 15, 1967. (A 33)

On October 21, 1966, petitioner Walker propounded interrogatories, in a form consonant with Rule 33 of the Federal Rules of Civil Procedure, inquiring into the number of occasions prior to his arrest that the arresting officers had acted on information supplied by informer Jenkins and the reliability of her information on each such occasion. (R 18-20) (A 34) On October 21, 1966, upon motions duly made and arguments heard, the District Court entered an order denying objections to these interrogatories and requiring answers to them. (R 25) (A 39)

On October 26, 1966, the Attorney General for the State of California filed an application with the Court of Appeals for the Ninth Circuit for leave to petition for writ of mandamus and/or prohibition, and such leave was granted. (R 2) On May 10, 1967, the Circuit Court granted the writ

and vacated the District Court order requiring answers to the interrogatories. *Wilson* v. *Harris*, 378 F.2d 141 (9th Cir. 1967). It held that the District Court was without power to make such an order because neither Federal Rule of Civil Procedure 81(a)(2), nor any other power of the District Court, authorized the use of interrogatories for discovery purposes in habeas corpus proceedings.

Summary of Arguments

Argument (A): *Townsend* v. *Sain*, 372 U.S. 293 (1963), *Brown* v. *Allen*, 344 U.S. 443 (1953), and 28 U.S.C. §2243 establish the power and duty of the district courts to hold evidentiary hearings to inquire into the facts with respect to constitutional issues raised in habeas corpus proceedings. Implicit in this power and duty is the authority of the courts to employ discovery techniques when, as in the habeas corpus proceeding below, they are necessary to make such evidentiary inquiries meaningful.

Argument (B): In addition to their procedural powers derived from federal statutes and the decisions of this Court, the district courts possess the inherent power to fashion their rules of procedure "to promote the orderly and expeditious administration of justice." Such inherent power has frequently been held to authorize the issuance of discovery orders where, as here, it is plainly in the interests of justice to do so. The decision of the Court of Appeals below abrogating such power is absolutely without precedent.

Argument (C): District courts possess the power under 28 U.S.C. §1651(a), the All Writs Statute, to issue "all writs necessary or appropriate in aid of their respective

jurisdictions and agreeable to the usages and principles of law." The discovery order of the District Court below meets the requirements of this provision. Directed as it is to a public official, the order is a form of the writ of mandamus. Furthermore, it is a form of exercise of the Court's power to issue subpoenas ad testificandum and duces tecum, which are "writs" under section 1651(a). The order has been issued in aid of the Court's existing habeas corpus jurisdiction. Finally, as an instrument "designed to achieve the rational ends of law," the order is agreeable to the usages and principles of law.

Argument (D): Rule 1 of the Federal Rules of Civil Procedure authorizes the use of discovery interrogatories conforming to Rule 33. Under Rule 1, all the Federal Rules are applicable to "all suits of a civil nature" except as otherwise provided in Rule 81. Habeas corpus has traditionally been considered a "suit of a civil nature," and the rules are therefore applicable to such a proceeding except insofar as they are made inapplicable by Rule 81.

Rule 81 does not preclude application of Rule 33 to habeas corpus proceedings. Respondent's contention that Rule 81 (a)(2) makes all the Federal Rules inapplicable to habeas corpus is contrary to the language of that provision, to its legislative history, and to its interpretation by the federal courts. The interpretation of that provision by the Court of Appeals below to require petitioner to produce a reported use of discovery interrogatories prior to 1938 as a prerequisite to use of Rule 33 today is likewise inconsistent with the statutory language of Rule 81 (a)(2), with any reasonable construction of the intent of its framers, and with prevailing authority.

Properly interpreted, Rule 81 (a)(2) makes inapplicable only those rules providing specific procedures which were unsuitable for use in habeas corpus "practice"—that is, the general form of a habeas corpus proceeding—as that proceeding existed at the time the rules were enacted. The discovery procedure provided by Rule 33 was suitable for use in a pre-1938 habeas corpus proceeding, and consequently is not made inapplicable by Rule 81.

ARGUMENT

The District Court Below Had the Authority to Order the Use of Discovery Interrogatories Pursuant to

(A) The Mandates of Townsend v. Sain, Brown v. Allen, and 28 U.S.C. §2243;

(B) Its Inherent Power to Insure a Fair and Just Hearing;

(C) The "All Writs" Statute, 28 U.S.C. §1651(a); and

(D) The Federal Rules of Civil Procedure, Rules 1 and 33.

(A) The Mandates of Townsend v. Sain, Brown v. Allen, and 28 U.S.C. §2243, Requiring the District Court to Hear and Determine the Facts in an Evidentiary Hearing, Provide the Court With the Authority to Order Discovery of Facts Essential to Such a Hearing.

A decade and a half ago this Court affirmed the existing power of a federal district court in a habeas corpus proceeding to hold a trial of fact to inquire into federal constitutional issues raised by a petitioner. *Brown* v. *Allen*,

344 U.S. 443 (1953). At that time, the Court declared that discovery techniques available in ordinary civil actions could be employed in preparation for such a trial:

> "28 U.S.C. §2245 allows a certificate as to certain facts; section 2246 provides for depositions and affidavits. Section 2247 makes liberal provision for the use of records of former proceedings in evidence. See also sections 2248-2254, inclusive. *Of course, the other usual methods of completing the record in civil cases, such as subpoena duces tecum and discovery, are generally available to the applicant and respondent.*" (344 U.S. at 464, n. 19) (Emphasis added).

Ten years later, in *Townsend* v. *Sain*, 372 U.S. 293 (1963), this Court held that evidentiary hearings were under certain circumstances not only permissible, but mandatory:

> "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." (372 U.S. at 313).

At the same time, the Court also reaffirmed the power of a district court to order discovery of facts material to such hearings. "The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary." (372 U.S. at 312).

The Court's declarations in *Brown* v. *Allen* and *Townsend* v. *Sain* confirming the discovery powers of a district court recognize that without such powers most evidentiary hearings, instead of providing constitutional safeguards against unjust imprisonment, would be nothing more than empty exercises. The mandates of these cases and of the statutory direction to the Court to "hear and determine the facts" (28 U.S.C. §2243) do not presuppose that the facts essential to such hearings will materialize magically before the trial court. In many cases, essential facts are inaccessible and can be obtained only with the aid of appropriate discovery orders. Even with regard to accessible facts, most habeas corpus petitioners are not able to utilize ordinary methods of investigation and preparation of their cases. They are precluded by their incarceration from gathering facts personally; many, including petitioner Walker, are prevented by their indigency from retaining others to do such work. The power to order the use of such devices is, in short, an integral component of the duty and power of a district court to hold the meaningful evidentiary hearings required by *Townsend* v. *Sain* and section 2243. The order of the District Court below compelling answers to petitioner Walker's interrogatories was simply an exercise of this power.

The propriety of the Court's order to hold an evidentiary hearing is beyond dispute. The record revealed that peti-

tioner Walker was arrested and his premises searched solely on the basis of information provided by an informant. As such, the arrest and search were constitutionally permissible only if the informant was reliable and the arresting officers had reason to believe the information provided. *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Beck* v. *Ohio*, 379 U.S. 89 (1964). Petitioner Walker's state court record, along with newly discovered evidence (A 13-17) created grave doubt as to the reliability of the informer and the reasonableness of the arresting officers' reliance upon her. The facts bearing on these issues of reliability and reasonableness were not adequately developed at trial. (A 19-22) Indeed, despite the efforts of petitioner Walker's attorney, the informer was not even produced at trial. Therefore, under the standards set forth in *Townsend* v. *Sain*, there was a "substantial allegation of newly discovered evidence", and it was apparent that "the material facts were not adequately developed at the state court hearing." *Townsend* v. *Sain*, 372 U.S. 293, 313 (1963). Under these circumstances, the District Court was required to hold an evidentiary hearing.

The discovery order issued by the District Court is an essential step in fulfilling this requirement. The interrogatories inquire directly into the issues of the reliability of the informer's story and reasonableness of reliance upon it. As such, they go directly to the constitutional issues requiring the evidentiary hearing itself. Without the information requested by the interrogatories, it will be virtually impossible for petitioner Walker or his counsel to prepare for the resolution of the constitutional issues on which the disposition of Walker's hearing—and liberty—depend. Only through such interrogatories will petitioner

Walker be able to anticipate the necessity for rebuttal evidence, and to prepare for possible impeachment of Respondent's witnesses. Only through such interrogatories can surprise to the parties and the Court be avoided, and litigation of the issues proceed on the basis of fact rather than speculation. In sum, only through such interrogatories can the District Court discharge its duty under *Townsend* v. *Sain* to hold a fair and meaningful evidentiary hearing.

(B) The District Court Has the Inherent Power to Order the Use of Discovery Interrogatories in Order to Insure a Fair and Just Evidentiary Hearing.

Apart from its powers derived from federal statute and decisions of this Court, the District Court below also possesses a more general power inherent in its duty to effect the ends of justice:

> "Even in the absence of any statutory provision or regulation, courts have inherent power to make their own rules of practice and procedure to facilitate the business of the court and to promote the orderly and expeditious administration of justice for the benefit of the parties as well as for the benefit of the court." *Tribune Review Pub. Co.* v. *Thomas,* 120 F.Supp. 362, 371 (W.D. Pa. 1954).

Such inherent power has been the basis for numerous orders by the federal courts, including discovery orders similar to the one presently in issue. In *Shores* v. *United States,* 174 F.2d 838 (8th Cir. 1949), the Court, although declining to order discovery of a copy of a confession, expressly declared that it had the power to make such an order:

"We think that such a power of control over a confession and its use does exist in a judicial proceeding, as part of the inherent nature and dignity of our system of administering criminal law, and that even without any rule or statute, therefore, the court is not powerless to require the Government to furnish the defendant with a copy of his confession, if the Government intends to use it as evidence on the trial and where the court deems it necessary in the interest of justice that the defendant should be furnished with a copy." (174 F.2d at 845).

In *United States* v. *Nolte*, 39 F.R.D. 359 (N.D. Cal. 1965), the Court similarly found that in the absence of any rule or statute to the contrary, the Court retained the inherent power to enter an order permitting the defendant to discover a tape recording bearing directly upon his case. In *United States* v. *Taylor*, 25 F.R.D. 225 (E.D.N.Y. 1960), the Court reviewed briefly the tradition of the judiciary's inherent power to order discovery and concluded that without statutory contradiction such inherent power remained intact:

"I doubt that the rules [of Criminal Procedure], although a comprehensive regulation of federal criminal procedure, entirely supplant the residual power of the Court. I doubt the advisability of reading an imaginative implication into Rule 16 that would deprive the Court of its inherent power, shut off the development of discovery by adjudication and thus freeze its limits along the lines determined by cases which had been decided when the rules were formulated. In my view, to the extent that Rule 16 does not express a policy prohibiting discovery not explicitly

> authorized by the rules, the Court is free, either by local rule or by adjudication, to permit discovery on the basis of its inherent power." (25 F.R.D. at 228).

And, in *United States* v. *Williams,* 37 F.R.D. 24 (S.D.N.Y. 1965), the Court held that discovery of a relevant interview with a government attorney was an appropriate exercise of its inherent power, and entered its order accordingly. See also: *United States* v. *Murray,* 297 F.2d 812 (2d Cir. 1962), *cert. denied* 369 U.S. 828 (1962); *United States* v. *Rothman,* 179 F.Supp. 935 (W.D. Pa. 1959); *United States* v. *Pete,* 111 F.Supp. 292 (D.D.C. 1953); Hon. Irving R. Kaufman, "Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts," 57 Colum. L. Rev. 1113, 1121 (1957). That these cases are criminal rather than civil in nature is irrelevant. Because the Court's inherent power stems from its fundamental duty to determine the truth in all proceedings before it, such power exists in criminal and civil cases alike.

With specific reference to the exercise of inherent discovery powers in habeas corpus proceedings, in only one reported instance prior to the decision of the Court of Appeals below did a federal court refuse to authorize the use of a discovery device. *Sullivan* v. *United States,* 198 F.Supp. 624 (S.D.N.Y. 1961). Even in that instance, however, the Court did not doubt its inherent power to order discovery when justified, and specifically stated that it had granted such discovery on prior occasions:

> "We, too, granted discovery of certain specified medical records heretofore sought by petitioner herein on a motion pursuant to Rule 34 of the Civil Rules which was virtually consented to by the government, and

> *which we felt justified in ordering, primarily as an exercise of the inherent power of the court,* and not because we agreed with the appellation that this is a 'civil case' to which the Civil Rules apply." (198 F. Supp. at 626) (Emphasis added).

The effect of the decision of the Court of Appeals below is to abrogate the inherent discovery power of the District Court. As such, that decision is absolutely without precedent.

The Court of Appeals cites no precedent for its decision, and the only precedent suggested by Respondent is his reference to the case of *Miner* v. *Atlass,* 363 U.S. 641 (1960). (Response in Opposition to Petition for Writ of Certiorari, p. 26; hereafter "Response") In that case, the Court decided that a district court, sitting in admiralty, did not have the power to order the taking of oral depositions for discovery purposes only. In so deciding, the Court was careful to state that its decision was confined strictly to the use of discovery *depositions,* and more particularly the use of those depositions in *admiralty:*

> "We deal here only with the procedure before us, and our decision is based on its particular nature and history." (363 U.S. at 649).

The considerations which led the Court to conclude that such depositions could not be used in admiralty proceedings have no application to the case at bar.

First, the Court found no indication that district courts had ever before ordered discovery depositions in admiralty proceedings. Citing the statement by Benedict on Admiralty that "'[a]n admiralty deposition may only be

taken for the purpose of securing evidence, it may not be taken for the purpose of discovery' ", the Court commented that "This statement by a leading work in the field hardly bespeaks the existence of traditional inherent power, and we find none." (363 U.S. at 644).

No such barrier exists in the present case, for the use of interrogatories and other discovery tools in habeas corpus is well established. See *Knowles* v. *Gladden*, 254 F. Supp. 643, 644-45 (D. Ore. 1965), *aff'd*, 378 F.2d 761 (9th Cir. 1967) and *Sullivan* v. *Dickson*, 283 F.2d 725, 727 (9th Cir. 1960), *cert. denied* 366 U.S. 951 (1961) (dictum) (Depositions upon oral examination); *Harris* v. *North Carolina*, 240 F.Supp. 985, 989-990 (E.D.N.C. 1965) and *Schiebelhut* v. *United States*, 318 F.2d 785-86 (6th Cir. 1963) (Written interrogatories); *Smith* v. *United States*, 174 F.Supp. 828, 830 (S.D. Cal. 1959), *appeal dismissed*, 272 F.2d 228 (9th Cir. 1959), *cert. denied* 362 U.S. 954 (1960) (Compulsory mental examination); *United States ex rel. Seals* v. *Wiman*, 304 F.2d 53, 63-64 (5th Cir. 1962) (Request for Admissions).

Second, the Court in *Miner* was concerned about Rule 81(a)(1) of the Federal Rules of Civil Procedure and the legislative history of the General Admiralty Rules, both of which revealed a clear intent to exclude discovery depositions from admiralty proceedings. At the time *Miner* was decided, Rule 81(a)(1) of the Federal Rules of Civil Procedure flatly provided that "these rules [including the rules providing for discovery depositions] do not apply to proceedings in admiralty." In addition, although several of the Federal Civil Rules were incorporated into the General Admiralty Rules, Civil Rule 26 relating to discovery depositions was conspicuously omitted. The Court stated: "We

cannot of course regard this significant omission as inadvertent, [citation]; rather, it goes far to establish the lack of any provision for discovery by deposition in the General Admiralty Rules." (363 U.S. at 645).

Insofar as habeas corpus is concerned, there is nothing in the Federal Rules similar to the absolute bar applied to admiralty by Rule 81(a)(1). On the contrary, the discovery provisions in the Federal Rules are made applicable to habeas corpus under a correct interpretation of the Rules. (See infra pp. 33-35). Nor is there any legislative history akin to that of the General Admiralty Rules disclosing a desire to preclude the use of discovery interrogatories in habeas proceedings. (See infra pp. 26-27).

Third, particularly in view of Rule 81(a)(1) and the legislative history of the General Admiralty Rules, the Court in *Miner* was reluctant to extend to admiralty a procedure so novel and innovative as discovery depositions upon oral examination. The Court stated that "[d]iscovery by deposition is at once more weighty and more complex" than other procedures. (363 U.S. at 649). Discovery by deposition is not at issue in the present case. Discovery interrogatories are at issue, and are not the least bit novel. As demonstrated below (infra pp. 31-32), they have been used in the federal courts since at least 1912.

Finally, in dealing with admiralty the Court was not addressing itself to a proceeding governed, as habeas corpus is governed, by the overriding dictates of "law and justice" (28 U.S.C. §2243). It was not speaking of the procedures which might be employed in aid of "'the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement.'" *Fay* v. *Noia*,

372 U.S. 391, 400 (1963). Absent explicit statutory restrictions of a sort which do not exist here, the inherent power of the District Court to employ discovery interrogatories in the habeas corpus proceeding below should not, and properly cannot, be impaired.

(C) The "All Writs" Statute, 28 U.S.C. §1651(a), Provides the District Court With the Authority to Order the Use of Discovery Interrogatories in Aid of Its Habeas Corpus Jurisdiction.

The discovery order of the District Court below is authorized by 28 U.S.C. §1651(a), popularly known as the All Writs Statute:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

To qualify under this provision, an order must meet three tests: (1) It must be a "writ"; (2) it must be issued in aid of the court's independently existing jurisdiction; and (3) it must be agreeable to the usages and principles of law.

The order of the District Court below is in the nature of a writ of mandamus. Like that writ, the order directing the Respondent to answer petitioner Walker's interrogatories is an order commanding a public official to perform a duty. *Stern* v. *South Chester Tube Co.*, 390 U.S. 606, 608 (1968).* The fact that the order is not designated a

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* The order of the District Court reads as follows:

"It is ordered that Respondent's objections are denied, and that Respondent shall answer said interrogatories on or before October 26, 1966." (R 25) (A 46).

writ of mandamus is of no consequence. The abolition of the writ of mandamus as so denominated (Rule 81(b), Fed. R. Civ. P.) would make such a form impossible. And, in any event, it is clear that orders of a district court may be considered "writs" under the All Writs Statute. *Stern* v. *South Chester Tube Co.*, 390 U.S. 606 (1968); *United States* v. *Wallace*, 222 F. Supp. 485 (M.D. Ala. 1963). Thus, the order of the District Court below qualifies under the statute so long as it meets the other requirements of the Act.

With respect to the requirement that the order issue in aid of the court's jurisdiction, it is beyond dispute that the District Court has independent habeas corpus jurisdiction, 28 U.S.C. §§2241-2255; *Brown* v. *Allen*, 344 U.S. 443 (1953); *Townsend* v. *Sain*, 372 U.S. 293 (1963), and that the discovery order in question was issued in aid of that jurisdiction.

As for the requirement that such orders issue "according to the usages and principles of law," the question arises as to whether this language requires an order to conform precisely to the writ it simulates, issuing only in circumstances identical to those in which the writ would issue at common law; or whether this provision permits an order to conform with some flexibility to its common law counterpart, issuing in circumstances akin to—but not absolutely identical to—those at common law. With specific reference to the present case, the question is whether the discovery order below can issue only if it commands a public officer to perform a separately existing "ministerial" duty, as did the order in an original proceeding for mandamus at common law, or whether it is sufficient that the order compels such an officer to perform an official act, as does the order below.

The Court has answered this question. In *Price* v. *Johnston*, 334 U.S. 266 (1948), the petitioner, a prisoner, sought a writ of habeas corpus under the All Writs Statute for the purpose of personally arguing his case to the Court of Appeals. The Supreme Court recognized that no writ existed for such a purpose at common law, but nonetheless found that issuance of a modified writ to accomplish such a purpose was "agreeable to the usages and principles of law," and was therefore authorized by the All Writs Act:

> "[W]e do not conceive that a circuit court of appeals, in issuing a writ of habeas corpus under §262 of the Judicial Code [citation to predecessor of 28 U.S.C. §1651(a)] is necessarily confined to the precise forms of that writ in vogue at the common law or in the English judicial system. Section 262 says that the writ must be agreeable to the usages and principles of 'law,' a term which is unlimited by the common law or the English law. And since 'law' is not a static concept, but expands and develops as new problems arise, we do not believe that the forms of the habeas corpus writ authorized by §262 are only those recognized in this country in 1789, when the original Judiciary Act containing the substance of this section came into existence. In short, we do not read §262 as an ossification of the practice and procedure of more than a century and a half ago. Rather it is a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.' *Adams* v. *United States* [317 U.S. 273]." (334 U.S. at 282)

The order of the District Court below does not differ from the traditional writ of mandamus to any greater extent than the order authorized by this Court in *Price* v. *Johnston* differed from the traditional writ of habeas corpus. Like the order in *Price* v. *Johnston,* it is a "procedural instrument designed to achieve 'the rational ends of law.'" As such, it fully conforms to the requirements of section 1651(a).

The discovery order below may be equally sustained under the All Writs Statute as a form of exercise of the subpoena powers of the District Court. It has long been established that subpoenas ad testificandum and subpoenas duces tecum are authorized by the All Writs Act, *American Lithographic Co.* v. *Werckmeister,* 221 U.S. 603, 609 (1911) and may be specifically employed for the purposes of pretrial discovery. *Bethlehem Shipbuilding Corp.* v. *N.L.R.B.,* 120 F.2d 126 (1st Cir. 1941); *Olson Rug Co.* v. *N.L.R.B.,* 291 F.2d 655, 658 (7th Cir. 1961); *Kamen Soap Products Co.* v. *United States,* 110 F.Supp. 430 (Ct. Cl. 1953). It is also clear that the subpoena powers are available to the district courts in habeas corpus proceedings. *Brown* v. *Allen,* 344 U.S. 443 (1953); *Estep* v. *United States,* 251 F.2d 579, 581 (5th Cir. 1958); *Lyles* v. *Beto,* 32 F.R.D. 248 (S.D. Texas 1963).

The discovery order of the District Court is essentially a streamlined and economic use of these existing subpoena powers: the Court could have issued subpoenas ad testificandum and duces tecum to the arresting officers and, through a limited pretrial hearing, secured precisely the same information requested by the interrogatories. Indeed, the Court in *Brown* v. *Allen* anticipated the possible need

for such a procedure and provided for its employment.* The order compelling Respondent to answer interrogatories simply eliminates the burdens of a double hearing and obviates the need for undue consumption of the Court's calendar and the time of the witnesses and counsel. It avoids the expense of a double hearing—expense which may be prohibitive to an indigent habeas corpus petitioner—and removes the risk of obtaining incomplete information inherent in taking discovery at one sitting rather than at the witness' convenience over a reasonable period of time. The order authorizing use of interrogatories, in short, is a streamlined and desirable form of the Court's existing subpoena powers. As this Court has said in construing the scope and flexibility of the All Writs Statute, "dry formalism should not sterilize procedural resources which Congress has made available to the federal courts." *Adams v. United States,* 317 U.S. 269, 274 (1942). To deny the modified use of the Court's subpoena powers in the present case would merely pay tribute to dry formalism and result in a derogation of the Great Writ itself. Nothing in the All Writs Act or any other statute would justify such a result.

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* After noting that "subpoena duces tecum and discovery, are available" in habeas corpus, the Court added:

> "If useful records of prior litigation are difficult to secure or unobtainable, the District Court may find it necessary or desirable to hold limited hearings to supply them where the allegations of the application for habeas corpus state adequate grounds for relief." (344 U.S. at 464, n. 19).

(D) Rules 1 and 33 of the Federal Rules of Civil Procedure Authorize the Use of Discovery Interrogatories in the District Court and, Contrary to the Decision Below, Rule 81(a)(2) Does Not Deny the Applicability of Those Rules to Habeas Corpus Proceedings.

The scope of application of the Federal Rules of Civil Procedure is defined by Rule 1 as follows:

> "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81."

As Respondent concedes, "habeas corpus has always been considered in the nature of a civil proceeding" (Response p. 18). See *Fisher* v. *Baker,* 203 U.S. 174, 181 (1906); *Cross* v. *Burke,* 146 U.S. 82, 88 (1892); *Kurtz* v. *Moffitt,* 115 U.S. 487, 494 (1885); *Ex Parte Tom Tong,* 108 U.S. 556, 559 (1883); see Note, "Civil Discovery in Habeas Corpus," 67 Colum. L. Rev. 1296, 1298 (n. 14) (1967). Accordingly, the federal district courts and courts of appeal, including the Ninth Circuit, have authorized the use in habeas corpus proceedings (or in proceedings under 28 U.S.C. §2255 which are in the nature of habeas corpus proceedings) of all except one of the discovery devices in the Federal Rules of Civil Procedure [production of documents (Rule 34)]. Depositions upon oral examination (Rules 26 and 30) were used or authorized to be used in *Knowles* v. *Gladden,* 254 F.Supp. 643, 644-45 (D. Ore. 1965), *aff'd,* 378 F.2d 761 (9th Cir. 1967) and *Sullivan* v. *Dickson,* 283 F.2d 725, 727 (9th Cir. 1960), *cert. denied* 366 U.S. 951 (1961) (dictum). Depositions upon written interrogatories (Rule 31) were

authorized and used in *Molignaro* v. *Dutton*, 373 F.2d 729 (5th Cir. 1967) and *Fortner* v. *Balkcom*, 380 F.2d 816 (5th Cir. 1967), respectively. Written interrogatories (Rule 33), which petitioner Walker seeks to employ here, were used or authorized to be used in *Harris* v. *North Carolina*, 240 F.Supp. 985, 989-90 (E.D.N.C. 1965) and *Schiebelhut* v. *United States*, 318 F.2d 785, 786 (6th Cir. 1963). Compulsory mental examination (Rule 35) was employed in *Smith* v. *United States*, 174 F.Supp. 828, 830 (S.D.Cal. 1959), *appeal dismissed*, 272 F.2d 228 (9th Cir. 1959), *cert. denied*, 362 U.S. 954 (1960). Requests for admissions (Rule 36) were used in *United States ex rel. Seals* v. *Wiman*, 304 F.2d 53, 63-64 (5th Cir. 1962). And the discovery rules as a whole were authorized for use in *Rodgers* v. *Bennett*, 320 F.2d 83 (8th Cir. 1963) (dictum). See also Hon. James M. Carter, "Pre-Trial Suggestions For Section 2255 Cases," 32 F.R.D. 393, 396 (1963).

Both Respondent (Response pp. 10-18) and the decision of the Court of Appeals below (378 F.2d 141 at 143-44) contend, however, that petitioner Walker's use of discovery interrogatories, which comply in all respects with Federal Rule 33, is absolutely barred by Rule 81(a)(2). During the proceedings below, Federal Rule 81(a)(2) read in pertinent part as follows:

> "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States."

It has since been amended to read:

> "These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions."*

Respondent, the Court of Appeals below, and Petitioner have each construed Rule 81(a)(2) in a different fashion.

1. *Respondent's Interpretation.* Respondent interprets Rule 81(a)(2) to mean that *none* of the Federal Rules are appropriate in habeas proceedings, "except on appeal." (Response p. 11). This is said to be apparent from the language of the provision, more particularly from the phrase "but they [the Rules] are not applicable otherwise than on appeal" in the original version (Response p. 11), and from what Respondent terms its "genealogy" (Response p. 13).

Far from supporting Respondent's interpretation, the language of Rule 81(a)(2) (in both its original and amended forms) is fatal to it. The original version explicitly stated that the Rules *were* applicable to habeas otherwise than on appeal "to the extent that" certain conditions discussed below exist (*infra* pp. 29-35). The amended version expressly provides that "[T]hese rules *are applicable* to proceedings for . . . habeas corpus . . ." (emphasis added) to the extent the same conditions are satisfied. Respondent's contention that the provision operates to exclude the Rules

* The stated purpose of this amendment was to "eliminate inappropriate references to appellate procedure", Fed. R. Civ. P. 81(a), Explanatory Note, 43 F.R.D. 164 (1968), and it does not alter the issue regarding the statute's interpretation presently before the Court.

in toto from habeas thus cannot be reconciled with the language of the provision in its entirety.

Nor does the so-called "genealogy" of the provision upon which Respondent relies support such an interpretation. In the first place, that genealogy consists not of any true legislative history, but merely of informal remarks of three individuals who were connected with the Advisory Committee on Federal Rules. (Response pp. 12-15). Moreover, the actual remarks of two of these individuals were significantly different from those attributed to them by Respondent. Edward H. Hammond, for example, did not state that "the final draft excluded habeas corpus," as Respondent quotes him as saying. (Response p. 12). He stated that:

> "The applicability or non-applicability of the rules to the extraordinary legal remedies, such as habeas corpus and quo warranto, and to certain statutory proceedings, not mentioned in the old rule on applicability of the rules (Rule 90) is stated in the new rule. (Rule 82)." E. Hammond, "Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure," 23 A.B.A.J. 629, 634 (1937).

And, contrary to Respondent's assertion, Edgar B. Tolman did not advise the Committee of the Judiciary for the House of Representatives that the Rules "apply [only] to appeals with regard to . . . habeas corpus . . ." (Response pp. 13, 15). The author did not use the crucial word "only," which alters the entire meaning of the phrase; he simply stated that "they apply to appeals with regard to . . . habeas corpus . . . " *Hearings on H.R. 8892 Before the House Comm. on the Judiciary*, 75th Cong., 3d Sess., at 130

(1938). The informal remarks of the third individual, William D. Mitchell (Response p. 13), are now generally considered to have been inaccurate. Note, "Multi-party Federal Habeas Corpus," 81 Harv. L. Rev. 1482, 1495 (n. 100) (1968); Note, Civil Discovery In Habeas Corpus," 67 Colum. L. Rev. 1296, 1298 (n. 16) (1967).

What true legislative history of the provision exists is squarely against Respondent. The first time habeas corpus was mentioned in any draft was in a draft of February 20, 1937. It specified that except for appeals, to which the rules would be applicable, habeas corpus would be governed exclusively by existing statutes. *Advisory Comm. on Rules for Civil Procedure, Preliminary Draft 3 as Revised,* draft Rule 90(a) (Feb. 20, 1937). Had such a provision been enacted it would have provided the blanket exclusion for which Respondent contends. But it was not. It was deleted from the draft of April 30, 1937 in favor of a provision nearly identical to Rule 81(a)(2) which was ultimately enacted. *Advisory Comm. on Rules for Civil Procedure, Report,* draft Rule 83(a)(2) at 206, 210-12 (April 1937). In short, the legislative history of the provision suggests that the framers made a deliberate decision *not* to exclude the Rules altogether from habeas corpus.

Common sense compels the same conclusion. Certain proeedures embodied in the Rules, such as amendment of pleadings upon a showing of cause [Rule 15(a)] and motions for judgment on the pleadings [Rule 12(c)], had been employed in habeas corpus proceedings long before 1937. Rollin C. Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus,* pp. 257, 289-90 (2d ed. 1876). A provision which operates, as Respondent suggests that Rule 81(a)(2) operates, to exclude all the Rules

from habeas corpus "except on appeal" would render all the traditional procedures mentioned in the Rules unavailable simply *because* they are in the Rules. It is most improbable that the framers intended such a bizarre result.

Respondent's interpretation is also squarely in conflict with more than a dozen prior federal cases. It cannot be reconciled, of course, with the cases discussed above in which the various Rules covering discovery procedures have been employed. Nor can it be reconciled with numerous cases from five Circuits in which other Rules have been used. *United States ex rel. Tillery* v. *Cavell,* 294 F.2d 12, 18 (3d Cir. 1961), *cert. denied,* 370 U.S. 945 (1962) [Rule 60(a)]; *Estep* v. *United States,* 251 F.2d 579, 581-83 (5th Cir. 1958) [Rules 45(c) and 41(a)(1)]; *Abel* v. *Tinsley,* 338 F.2d 514, 516 (10th Cir. 1964) [Rule 60(b)]; *Hunter* v. *Thomas,* 173 F.2d 810, 812 (10th Cir. 1949) [Rule 59(a)]; *Bowdidge* v. *Lehman,* 252 F.2d 366, 368-69 (6th Cir. 1958) [Rules 56 and 57]; *Hammerer* v. *Huff,* 110 F.2d 113 (D.C. Cir. 1939) [Rule 8(a)]; *United States ex rel. Bruno* v. *Herold,* 39 F.R.D. 570, 572 (N.D.N.Y. 1966) *rev'd on other grounds,* 368 F.2d 187 (2d Cir. 1966) [Rule 60(b)(6)]; *Bowen* v. *Boles,* 258 F.Supp. 111, 113 (N.D.W.Va. 1966) [Rule 6(b)(2)]; *In re McShane,* 235 F.Supp. 262, 266 (N.D. Miss. 1964) [Rule 56]; *Hamilton* v. *Hunter,* 65 F.Supp. 319 (D.Kan. 1946) [Rule 15(b)]; *Smith* v. *United States,* 174 F.Supp. 828 (S.D.Cal. 1959) [Rule 17(c)]. Even the Court of Appeals below did not find such a blanket exclusion of the Rules in Rule 81(a)(2).

In short, Respondent's interpretation of Rule 81(a)(2) is contrary to its language, its legislative history, and to the manner in which it has been construed by the federal courts.

2. *Court of Appeals' Interpretation.* The Court of Appeals construed Rule 81(a)(2) to bar the use of any procedure in the Rules which could not be demonstrated, by other than "theoretical" means, to have been (1) used in habeas corpus prior to enactment of the Rules in 1938 and (2) used in such pre-1938 habeas corpus in the same fashion that it was then used in actions at law and suits in equity. Thus, with reference to the Rule 33 discovery procedure ordered below, the Court of Appeals stated:

> "Walker argues . . . that habeas proceedings are civil in nature and contends that since, prior to September 16, 1938, discovery practice was available in civil proceedings in general, it must be assumed that discovery was available in habeas proceedings. We do not believe that the second condition of Rule 81(a)(2) can be satisfied on such a theoretical basis. In our view, that condition is met only if it can be shown [1] that, prior to September 16, 1938, discovery was actually being used in habeas proceedings, and [2] that such use conformed to the then discovery practice in actions at law or suits in equity." *Wilson* v. *Harris*, 378 F.2d 141, 143-44 (9th Cir. 1967). (Bracketed numbers added).

The only authority mentioned by the Court in support of this interpretation of Rule 81(a)(2) was the naked language of that Rule's "second condition" restricting use of the Federal Rules "to the extent that the practice in [habeas corpus] proceedings . . . has heretofore conformed to the practice in actions at law or suits in equity." Like Respondent's interpretation, however, the Court's interpretation does violence to the language of Rule 81(a)(2) and causes it to operate in a manner which does not make

sense today and which could scarcely have been intended by its framers.

The "second condition" requires a comparison between past habeas corpus "practice" and ordinary civil "practice" —the term "practice" denoting the *general form* in which proceedings are conducted. Black, Law Dictionary, p. 1135 (4th ed. 1951). The Rules are, therefore, applicable to habeas today only "to the extent" that the *general form* of habeas corpus proceedings conformed to the *general form* of ordinary civil proceedings prior to September 16, 1938. Nothing in the language of the condition, however, requires a comparison between *specific procedures*—e.g., discovery procedures—employed in past habeas corpus practice and specific procedures employed in other kinds of civil proceedings. By requiring Petitioner Walker to show that the particular procedure which he sought to employ was "prior to September 16, 1938 . . . actually being used in habeas proceedings" and that "such use conformed to the then discovery practice in action at law or suits in equity," the Court imported into Rule 81(a)(2) a brand new prerequisite to the application of the Rules.

While this additional prerequisite would not strip modern habeas corpus practice of some of its traditional procedures as Respondent's interpretation would, it would still confine modern habeas corpus to those procedures alone. A procedural advance included in the Rules could not by definition conform to any procedure used in habeas corpus prior to enactment of the Rules. The effect of this reading of Rule 81(a)(2) would thus be to exclude such an advance automatically from use in habeas corpus proceedings. There is absolutely no evidence that the framers of Rule 81(a)(2) intended in this manner to freeze habeas proceedings in their pre-1938 form.

Moreover, such a reading of Rule 81(a)(2) is directly in conflict with several cases which have previously arisen in the Ninth Circuit. The specific procedures of discovery depositions and compulsory examinations, provided in Rules 30 and 35, were not used in either habeas corpus proceedings (or, for that matter, ordinary civil proceedings) prior to enactment of the Rules. Yet, as noted above, both of these novel devices have been employed in habeas corpus in recent years. See *Knowles* v. *Gladden*, 254 F. Supp. 643, 644-45 (D.Ore. 1965), *aff'd*, 378 F.2d 761 (9th Cir. 1967) (discovery deposition under Rules 26 and 30); *Smith* v. *United States*, 174 F.Supp. 828, 830 (S.D. Cal. 1959), *appeal dismissed*, 272 F.2d 228 (9th Cir. 1959), *cert. denied*, 362 U.S. 954 (1960) (mental examination under Rule 35).

Furthermore, even assuming that Rule 81(a)(2) does require Petitioner Walker to show that the specific procedure (discovery interrogatories) which he wished to employ was used in habeas corpus proceedings prior to enactment of the Rules, such a showing was adequately made. Unlike discovery depositions and medical examinations, discovery interrogatories were not a novelty when the Rules were enacted in 1938. Equity Rule 58, adopted in 1912, specifically provided that where, as here, a Court order was procured, such interrogatories could be employed. It stated in relevant part:

> "The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories

in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit." [226 U.S. 665 (1912)].

While this procedure could technically be employed only in a suit in equity, such a suit could be initiated solely for the purpose of obtaining such discovery in aid of an action at law; therefore, the device was available for discovery purposes in civil actions generally, whether legal or equitable in nature. Moore and Garfinkel, *4 Moore's Federal Practice,* §33.03[1], pp. 2261-62 (2d ed. 1967). Since, as even Respondent concedes, "habeas corpus has always been considered in the nature of a civil proceeding" (Response p. 18), there is every reason to believe that this discovery device was used in habeas corpus prior to enactment of the Rules, where, as here, a court order had been obtained.

The holding of the Court of Appeals below that this indication of usage was too "theoretical," however, says in effect that only the demonstration of reported instances of

conforming usage can satisfy the "second condition." This proof requirement, like the requirement of conformity to specific procedures used prior to 1938, has no basis in the language of Rule 81(a)(2). There is nothing in that language establishing any particular standard or method for making the requisite showing of conformity. There is certainly no language to suggest that the showing could be made only by production of reported instances of usage.

The absence of such language is hardly surprising. The silence of pre-1938 reported decisions—which are generally appellate decisions—with respect to the use of a particular procedure is as indicative that the procedure is being used without controversy as it is that the procedure is not being used at all. It is unlikely that the framers of Rule 81(a)(2) would have intended such ambiguous silence to preclude use of a Rule. And it is improbable that the framers would have intended that the availability of a Rule should depend upon the happenstance that its counterpart in habeas corpus prior to September 16, 1938 would be reported.

In sum, the requirements of procedural conformity and of reported proof of that conformity which were found by the Court of Appeals below to bar Petitioner Walker's use of discovery interrogatories are simply requirements of the Court's own making. They enjoy no support in the language of Rule 81(a)(2) and, if read into it, will cause it to operate in an arbitrary and regressive manner.

3. *Petitioner's Interpretation.* Petitioner interprets the "second condition" of Rule 81(a)(2) to bar the use of only those Rules providing techniques which could not be used in the general form or practice of habeas corpus as such

practice existed prior to enactment of the Rules. Rules 47 through 51, governing the conduct of jury trials, are examples of Rules made inapplicable by this provision. When the Rules were enacted in 1938, habeas corpus practice differed from ordinary civil practice in that jury trials were not held. William S. Church, *A Treatise on the Writ of Habeas Corpus, §172 (2d ed. 1893)*. The Rules governing jury trials had no application to habeas corpus practice at that time. Thus, they are excluded by Rule 81(a)(2).

The discovery rules, however, are a different matter. Although jury trials were not a part of habeas corpus practice in 1938, trials of fact, particularly on jurisdictional issues, were an established part of habeas corpus as well as ordinary civil practice. William S. Church, *A Treatise on the Writ of Habeas Corpus, §§170-71 (2d ed. 1893);* Paul M. Bator, "Finality In Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev. 441, 465-483 (1963). Discovery devices, designed as they are to facilitate trials of fact, were as suitable for use in a 1938 habeas corpus proceeding as they were in other civil proceedings. Thus, Rule 81(a)(2) does not preclude their use.

This interpretation accords with the language of the "second condition" of the Rule. As noted above, the comparison called for by the language of that provision is not between specific procedures, but between the "practice"—or general format of proceeding—in habeas corpus and that in ordinary civil proceedings in 1938. The Rules are thus excluded only "to the extent that" the general form of proceeding in habeas corpus did not conform to that in ordinary civil proceedings. To that degree, the Rules of procedure governing ordinary civil proceedings would

naturally be anomalous or unsuitable in the context of habeas corpus. However, to the extent that the format of habeas proceedings did conform to that in ordinary civil proceedings, the language of the "second condition" does not purport to exclude the use of the Rules of procedure governing ordinary civil proceedings. To this degree, the Rules would be as suitable for habeas corpus as for ordinary civil proceedings.

There is, moreover, no reason to believe that the framers of this provision intended it to preclude the use of any except Rules unsuitable to habeas corpus proceedings. What little legislative history exists bespeaks an intent to exclude the use of some Rules, but there is nothing in it to indicate that the framers wished to prevent the use of such Rules as were useful and appropriate in the traditional habeas format. It seems far more likely that the framers simply did not wish the enactment of the Rules to change that basic format and drafted this provision to insure that only such Rules as were suitable to, and consistent with, that format would be applied.

This has been the interpretation placed upon the provision by the federal courts in the many cases cited above in which various Rules have been applied in habeas corpus. The concern in those cases has not been whether or not the procedures in those Rules were used in habeas corpus prior to 1938; it has instead been whether or not those Rules were suitable in the context of traditional habeas corpus.

This is, we submit, the only inquiry which is compelled by the "second condition" of Rule 81(a)(2). So judged, the discovery interrogatory procedure which petitioner Walker sought to employ in this case is surely available.

CONCLUSION

For the reasons stated, petitioner prays that the decision of the Court of Appeals be reversed, that its writ of mandamus and/or prohibition be quashed, and that the order of the District Court denying the objections of Respondent to petitioner Walker's interrogatories and compelling answers thereto be reinstated.

Respectfully submitted,

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